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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re KEITH MOSLEY, on Habeas Corpus.	B225002 (Los Angeles County Super. Ct. No. BH006523)

APPEAL from a grant of petition for writ of habeas corpus of the Superior Court of Los Angeles County. Peter Paul Espinoza, Judge. Affirmed.

Edmund G. Brown, Jr., Attorney General, Julie L. Garland, Senior Assistant Attorney General, Phillip Lindsay and Kathleen R. Frey, Deputy Attorneys General for Appellant.

Michael Evan Beckman for Respondent.

The People appeal from the trial court's grant of Keith Mosley's petition for writ of habeas corpus after the Governor overturned the Board of Parole Hearing's grant of parole. The trial court found that there was no evidence to support the Governor's conclusion that Mosley represented a current danger if released, and ordered the grant of parole reinstated. Mosley was released. Having reviewed the record, we affirm the decision.

SUMMARY OF FACTUAL BACKGROUND

The Life Crime

In 1983, at age 16, Mosley was confined to Camp Mendenhall in Lake Hughes.[1] Having escaped, he entered the neighboring property, belonging to 56-year-old Philip Vodon, stole an ax, and drew satanic designs (which he attributed to the band Motley Crue); he ran when he heard Vodon return. He left a note at the camp asking if he could return without punishment, and hid on a rooftop overnight. Although Vodon had seen Mosley on his property, and notified the camp, personnel at the camp did not find him. The next morning, Mosley heard a loudspeaker announcement advising him to return to camp. Instead, he went back to Vodon's property, and, after seeing Vodon and his wife leave, entered the house, where he found, took, and loaded a rifle. Vodon returned; Mosley left the house and hid by the garage. Vodon saw Mosley, said "hey you" and reached for his gun. Mosley, thinking Vodon was going to shoot him, fired the rifle. Vodon staggered and fell. When one of Vodon's dogs lunged at Mosley, he shot the dog in the foot. Vodon was still alive; Mosley retrieved truck keys from Vodon's pocket, and drove away without rendering assistance.

The truck developed engine trouble. After wiping it down, and throwing away the rifle, Mosley abandoned the truck, and hitchhiked to Boron, California. He then took a

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[1] The factual summary is taken from the 1985 Probation Report.

bus to Idaho, where his grandfather lived. Accompanied by his grandfather, Mosley turned himself in to local police.

Prior to this crime, Mosley had a juvenile history for petty theft and attempted burglary. He had been placed in Camp Mendhall on July 15, 1983. He reported he had begun to use marijuana at age 4, and used LSD from the eighth through tenth grades. He had used speed for three years, occasionally used cocaine, and drank alcohol frequently. He reported being diagnosed with hyperactivity at age six. He also reported having been physically and sexually abused by his stepfather from an early age.

In 1985, Mosley entered a plea to second degree murder, and was sentenced to a term of 17 years to life. He served two years of his sentence at the California Youth Authority and the remainder at various facilities in California and Idaho.

Prior Parole Suitability Hearings

Prior to the parole hearing at issue, Mosley had been found unsuitable for parole and given a one year denial by the Board in 2007. The trial court granted a writ of habeas corpus challenging that finding in 2009, and ordered the Board of Parole Hearings (Board) to vacate its decision and hold a new hearing. The Board conducted that hearing on April 9, 2009. [2]

The 2009 Hearing

After reviewing Mosley's parole plans, job skills, and letters of support, the Board turned to his current programming and participation in AA and NA programs. Mosley indicated that there were currently no NA programs at the facility where he was housed, that he had been on a waiting list for AA for two months (having been unable to get on

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[2] The Parole Board had conducted a subsequent hearing on August 20, 2008, at which time it again denied parole for one year. The Board advised Mosley that he was very close to parole eligibility, and that he should make efforts to add transitional counseling to his parole plans before he returned. At the 2009 hearing, Mosley testified that he had done so.

the list in the two prior years), but that he was participating in self-study[3] . He had not participated in vocational training, as it was also not available.

The Board summarized the psychological reports. Mosley had last been extensively evaluated in 2007. That evaluator identified Mosley's disciplinary history while incarcerated as two episodes of receipt of stolen property in 1985-1986, an incident involving force and violence on another inmate in 1990, for which Mosley denied responsibility, participation in a work strike in 1994, and a violation in 2001 for unauthorized photocopying. Mosley denied knowledge that he was not allowed to use the photocopier for those purposes. There had been no discipline since 2001. The evaluator also reviewed Mosley's work history while incarcerated, and his numerous certificates of achievement and education. After interviewing Mosley[4] and his wife, and conducting testing procedures, he concluded "Overall, Mr. Mosley's responses to the items did not suggest the presence of overt behaviors that suggest maladaptive patterns that continue to exist today."

The results suggest "that he will maintain a consistent and socially acceptable behavioral pattern and that he will likely restrain signs of personal autonomy or individualism." He did note that Mosley was "potentially harboring rebellious feelings as a result of unassertiveness," and the "possibility of overcontrolled hostility." He nonetheless concluded:

> The examinee demonstrated good verbal skills for his developmental and achievement levels. He was effective in his communication, and he appeared to possess the ability to exercise excellent conflict resolution skills. In neither evaluation did Mr. Mosley evidence any inconsistent affect, thoughts, or behaviors, and/or affect/thoughts/behaviors suggestive

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[3] Mosley indicated his intent to attend AA and NA on his release, and had identified programs in which he could participate.

[4] The evaluator described Mosley as "tearful, thoughtful, remorseful" in talking about the crime. When asked, he stated "'I'll never stop thinking about what happened . . . a man lost his life . . . and I can't help thinking about his family and friends . . . I wish it wouldn't have happened.'"

of dangerous potential. Contrarily, Mr. Mosley appeared to evidence genuine and appropriate affect in both evaluation settings with different examiners. Mr. Mosley did not appear to abnormally or intentionally restrict or alter his affect or behavior in the interview settings. He was readily and consistently respectful, affable, and engaged. He presented as matter-of-fact and forthright in his responding. Over the course of the lengthy interviews, Mr. Mosley appeared to experience a wide spectrum of affect/behaviors, some of which were painful. Nevertheless, he appeared to express (particularly painful) affect without undue concern. Specifically, he exhibited moments of remorse, solemnity, tearfulness, humor, euthymia, etc. Mr. Mosley was especially thoughtful and tearful as he described his feelings regarding the initial crime that led to his incarceration. As he described the events that led to the shooting death of his victim, it appeared as though Mr. Mosley felt genuine concern for his victim's family, friends, loved ones. The examinee also appeared to engage in solemn consideration of what he and others have had to sacrifice as a result of his past actions. At no point in either interview did Mr. Mosley present as making an effort to distort his current situation, thoughts, affect, or his history. The aforementioned observation is specifically and more objectively supported by precipitous similarity in evaluator observations and assessment data profiles in different evaluation settings a year apart and with different psychologists.

[¶] . . . [¶]

In conclusion, the data taken together from this assessment and the previous evaluation completed a year ago do not indicate that Mr. Mosley poses a tangible threat to himself or the community-at-large. If paroled, however, Mr. Mosley's continued success will likely be dependent upon his ability to transition into community life (which he has never functioned in as an adult) and the availability and utilization of support resources described below:

RECOMMENDATIONS:

1. It is not unlikely that Mr. Mosley's adjustment will entail, at times, difficulty in reacquainting himself to routine community life (if paroled). It is also apparent that Mr. Mosley has dedicated significant effort to defining and pursuing family and vocational goals while incarcerated. Thus, it is recommended that, if paroled, vocational goals and family structure goals will continue to hold paramount importance. It is also likely that the aforementioned goals will, to some degree, exist as "measuring sticks" for Mr. Mosley's own assessment of his success versus failure. Thus, it is recommended that these areas be developed, as much as is feasible, pre-release. It is likely that the aforementioned areas be closely monitored and supported post-release.

2. It is strongly recommended that Mr. Mosley become actively involved in psychological treatment, if paroled. Specifically, there appear to be salient issues of guilt, remorse. Additionally, psychotherapy will likely be necessary in order to help insure a smooth transition from long incarceration to community life. Mr. Mosley has not functioned as an adult in society-at-large.

3. It is recommended that Mr. Mosley and his family initially become involved in a family psychotherapeutic venture. Mr. Mosley has not resided with his spouse or stepdaughters[]s. Family psychotherapy will likely assist in addressing any/all issues involving unfamiliarity, awkwardness, etc. Family psychotherapy will also likely be necessary, at least initially, in order to address additional family stressors (i.e., blended family, disgruntled biological parent – "Preston"). Depending upon stressors and family adjustment, family psychotherapy may be a brief "reusable" treatment modality.

The 2007 evaluation was confirmed in 2008 and 2009, concluding that the data "do not indicate that Mr. Mosley poses a tangible threat to himself or the community at large."

A representative of the Los Angeles District Attorney's office objected to granting parole.[5] Mosley's attorney argued for grant, and Mosley offered an oral and written statement to the Board:

> I would like the Board and the family of Phillip Vaden (*sic*) to know how I feel about my actions that led to the death of Mr. Vaden (*sic*). I would also like to express that I make no excuses, and I offer no justification for the horrible crime, but I do understand the factors of the destructive path I was on and the awful decisions I continued to make. During my past Board hearings, I have been asked certain questions that I would like to expound on today. I did not return to Camp Mendenhall because I wanted to avoid being punished. And although I was scared and afraid Mr. Vaden (*sic*) might shoot me, I have come to realize that my way of thought was not only immature and unjustified and that my fear and panic that existed in my mind was not the cause of this horrible crime, but the terrible decisions I made were a result of immaturity, poor moral character, my arrogance, my failure to respect the law and the feelings of others, as well as my destructive lifestyle. Through the programs Choice Theory and Moral Recognition Therapy, I have developed this insight, as well as conflict resolution skills. I have learned to cherish and have respect for life and others and the law. I have learned how to recognize and deal with stress and how important it is to seek help when needed, and how to make clear, rational and moral decisions. At the time of my crime, I had no clue of these responsibilities or modes of conduct, but now I do and have put to good use during the latter part of my term in an environment that is continuously filled with different kinds of stress. Through maturity, Moral Recognition Therapy and Choice Theory, I have learned how to make better choices, think about others' feelings, conflict resolution skills and how to recognize and use all the tools that have been available to me that will assure that I will be a productive and trustworthy part of any

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[5] Mosley's attorney objected to the statement and moved to strike it, contending that the trial court's order had limited the scope of the hearing to post-2007 events and that certain issues had been decided and were res judicata. As the Board denied the motion, and appeared to fully consider the entire record without regard to that prior ruling, we need not consider whether that position was correct.

> community I reside in. These skills are challenged in my current environment, where just as last week I went to the gym to play a few games of pool. I was first to the table when another inmate came up to me and said this is my table, give me the cue stick. Knowing that no one owns the pool tables and it is first-come/first-serve, so to speak, my initial thought was to argue the aforementioned. But noticing his tone and his body language, I could tell that this individual was looking for a fight and I was not going to give in to his anger. I simply put the cue stick down on the table and told him I was sorry for trying to play on his table and walked away with the satisfaction that I controlled the situation, that I diffused what could have potentially been a bad situation for me. In closing, I really need Mr. Vaden's family to know the depth of my sorrow and remorse for them. By saying that, I don't mean that I have – or having committed this crime, I'm just ashamed and embarrassed. My remorse comes from my heart. It is in my heart. Every day I think sadly about the void in the lives of the Vaden (*sic*) family that was created by me, and the suffering that I have caused them. There will never be adequate words to express this. And I don't ever expect to be forgiven. But some day I hope they will believe the sincerity of my words and feelings for them, and I hope that the Board understands this, and the extent of the insight and sense of responsibility I have gained from this. Thank you.

At the conclusion of the hearing, in light of the entire record, the Board determined Mosley was suitable for parole, as he "would not pose an unreasonable risk of danger to society or a threat to public safety if released from prison." On September 2, 2009, the Governor reviewed and reversed that grant of parole.

The Governor's Determination

After reviewing Mosley's history and the circumstances of the crime, the Governor also enumerated the positive aspects he identified in the record. The Governor nonetheless concluded that parole was not appropriate for the following reasons: the crime was especially heinous because the victim was particularly vulnerable; Mosley does not have sufficient insight and has not fully accepted responsibility for the crime; his

mental health evaluations cast doubt on the sincerity of his claimed acceptance of responsibility; his efforts at self-help and therapy have been minimal, despite recommendations for therapy and a history of substance abuse; and Mosley had been disciplined for serious misconduct in 2001. The Governor concluded that these factors, in combination with the gravity of the crime, indicate that release would "pose an unreasonable risk to public safety."

Mosley filed a petition for habeas corpus challenging this determination on December 4, 2009. The trial court issued an order to show cause on February 25, 2010, and, after briefing and argument, granted the petition on the ground that the record did not contain "some evidence" of current dangerousness and ordered the grant of parole reinstated on June 1, 2010. The Attorney General timely appealed, and sought a writ of supersedeas to bar Mosley's release which this court denied on July 22, 2010. Mosley is currently on parole.

DISCUSSION

The Law Governing Parole Determinations

This Court recently reviewed the standards governing parole suitability determinations in *In Re McDonald* (2010) 189 Cal.App.4th 1008. As we explained in that case, the Board may deny parole if "'the prisoner will pose an unreasonable risk of danger to society if released from prison.'" (*Id.* at p. 1019.) The Board must consider the entire record before it, as well as the factors indicating suitability or unsuitability set forth in the regulations. (Cal. Code Regs., tit.15, § 2402, subds. (c), (d).) The most fundamental consideration, however, is public safety, requiring assessment of current dangerousness. (*In re Lawrence* (2008) 44 Cal.4th 1181, 1205.)

"[T]he Board (and the Governor) [are authorized] to identify and weigh only the factors relevant to predicting 'whether the inmate will be able to live in society without committing additional antisocial acts.'" (*In re Lawrence*, *supra*, 44 Cal.4th. at pp. 1205-1206 (*Lawrence*), quoting *In re Rosenkrantz* (2002) 29 Cal.4th 616, 655 (*Rosenkrantz*).)

"[I]n directing the Board to consider the statutory factors relevant to suitability, many of which relate to postconviction conduct and rehabilitation, the Legislature explicitly recognized that the inmate's threat to public safety could be minimized over time by changes in attitude, acceptance of responsibility, and a commitment to living within the strictures of the law." (*Lawrence*, *supra*, at p. 1219.)

Consequently, the "statutory and regulatory mandate to normally grant parole to life prisoners who have committed murder means that, particularly after these prisoners have served their suggested base terms, the underlying circumstances of the commitment offense alone rarely will provide a valid basis for denying parole when there is strong evidence of rehabilitation and no other evidence of *current* dangerousness." (*Lawrence*, *supra*, 44 Cal.4th at p. 1211.) The Board (and the Governor) may, of course, rely on the aggravated circumstances of the commitment offense (among other factors) as a reason for finding an inmate unsuitable for parole; however, "the aggravated nature of the crime does not in and of itself provide some evidence of current dangerousness to the public unless the record also establishes that something in the prisoner's pre- or postincarceration history, or his or her current demeanor and mental state, indicates that the implications regarding the prisoner's dangerousness that derive from his or her commission of the commitment offense remain probative of the statutory determination of a continuing threat to public safety." (*Id.* at p. 1214.)

"The Governor may only affirm, modify, or reverse the decision of the parole authority on the basis of the same factors which the parole authority is required to consider." (Cal. Const., art. V, § 8(b).) "[T]he Governor undertakes an independent, de novo review of the inmate's suitability for parole [citation]." (*Lawrence*, *supra*, 44 Cal.4th at p. 1204.) The Governor "must consider all relevant statutory factors, including those that relate to postconviction conduct and rehabilitation. [Citation.]" (*Id.* at p. 1219.) "'Resolution of any conflicts in the evidence and the weight to be given the evidence are matters within the authority of the Governor. As with the discretion exercised by the Board in making its decision, the precise manner in which the specified factors relevant to parole suitability are considered and balanced lies within the discretion

of the Governor, but the decision must reflect an individualized consideration of the specified criteria and cannot be arbitrary or capricious.' (*Rosenkrantz, supra,* 29 Cal.4th at p. 677.)" (*McDonald, supra,* at p. 1021.)

The Standard of Review

"[W]hen a court reviews a decision of the Board or the Governor, the relevant inquiry is whether some evidence supports the *decision* of the Board or Governor that the inmate constitutes a current threat to public safety, and not merely whether some evidence confirms the existence of certain factual findings." (*Lawrence, supra,* 44 Cal.4th at p. 1212.) The inquiry for the reviewing court is "whether the identified facts are probative to the central issue of *current* dangerousness when considered in light of the full record before the Board or the Governor." (*Id*. at p. 1221.) "This standard in unquestionably deferential, but certainly is not toothless, and 'due consideration' of the specified factors requires more than rote recitation of the relevant factors with no reasoning establishing a rational nexus between those factors and the necessary basis for the ultimate decision-the determination of current dangerousness." (*Id.* at p. 1210.)

There is No Evidence of Current Dangerousness in This Record

Examining each of the factors the Governor relied on for his determination in turn, we conclude that this record does not contain some evidence of current dangerousness.

A. The Circumstances of the Crime

The Governor determined first that the murder was particularly heinous because of the age of the victim and the circumstances in which the shooting occurred. While the trial court disagreed, there is some evidence in this record to support the finding that the murder was committed in a cruel and callous manner. However, that evidence alone is not some evidence of current dangerousness. (*Lawrence, supra,* 44 Cal.4th at p. 1214.) There must be a rational nexus for concluding that this 27-year-old crime continues to be

predictive. (*Id.* at pp. 1210, 1221.) The Governor identified none, nor can we on this record.

B. Lack of Insight and Acceptance of Responsibility

Relying on previous, superseded mental health evaluations, the Governor concluded that Mosley did not have sufficient insight into his crime because he attempts to manipulate the manner in which he is regarded to present himself in the most favorable light. Reliance on outdated evaluations, however, is not some evidence of current dangerousness. "Where, as here, a stale negative psychological evaluation is superseded by subsequent positive evaluations, the previous negative evaluation does not constitute evidence that the inmate poses a current danger to the public." (*In re Aguilar* (2008) 168 Cal App.4th 1479, 1490; *Lawrence, supra*, 44 Cal.4th at pp. 1223-1224.) While the Governor does also quote from the most recent, full evaluation conducted in 2007, he ignores the conclusion of the examiner that the referenced language must be considered in light of the other information in the record, and that Mosley's profile is "firmly within normal limits." The Governor is not free to form a speculative conclusion as to experts' findings based on isolated comments from their reports, while ignoring their actual conclusions. "[D]ecisions must be supported by some evidence, not merely by a hunch or intuition" (*Lawrence, supra*, 44 Cal.4th at p. 1214.); see also *In re Dannenberg* (2009) 173 Cal.App.4th 237, 255.)

The Governor relies on the same, old, evaluations to question the sincerity of Mosley's acceptance of responsibility for the crime and insight into it. Again, the Governor relies on outdated reports, ignoring the conclusion of the most recent evaluator, discussed above, concerning the depth and sincerity of Mosley's remorse, a finding echoed by the Board that heard directly from Mosley at the hearing. We join many of our sister courts in expressing concern about the talismanic use of the "lack of insight" factor when, as here, it is uncoupled from any facts similar to those that justified its approval in *In re Shaputis* (2008) 44 Cal.4th 1241.

C. Self-Help and Therapy

The Governor next points to "minimal efforts " to seek self-help and therapy. However, this determination flies in the face of the record in this case, which binds the Governor's determination. It is undisputed that Mosley has had extremely limited opportunities to participate in programs, in light of his long-term placement in Idaho and the paucity of programs available there. This was fully explored by the Board, and there is no suggestion in the record that there was programming available in which he failed to participate. This is particularly true with respect to drug and alcohol abuse programs, as to which Mosley specifically described his attempts to participate whenever it was available to him, and his own successful efforts in the absence of formal programming. His failure to participate in services that were not available is not evidence that he declined to seek assistance.

With respect to therapy, the therapy identified in the 2007 evaluation was specifically linked to Mosley's post-release need for assistance in adjusting to life outside the prison's walls. Having been incarcerated since the age of 16, he had no experience living as a free adult. This recommendation by the evaluator for therapy to ensure success on parole is not evidence of a determination that parole should not be granted.[6]

D. Institutional Misconduct

Finally, the Governor points to the 2001 discipline, characterizing it as "serious misconduct." The nine- year-old unauthorized use of a copy machine, an event that is a violation of no law, is not the kind of misconduct that indicates an "unwillingness to conform his conduct within society's laws." (*In re Aguilar, supra*, 168 Cal.App.4th at p.1491 (non-violent, minor misconduct is not a factor establishing unsuitability for

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[6] Moreover, we note, consistent with the Board's recommendations in 2007 and 2008, Mosley had taken steps to identify therapy available to him on release and made that known to the Board.

parole.) We agree with the court below that this is not some evidence of, as the Governor concluded, an unreasonable current risk of danger to the public.

Remand to the Governor is not Required

Citing *In re Prather* (2010) 50 Cal.4th 238, the Attorney General argues that the proper remedy, should this Court find, as it has, that the Governor's reversal was not supported by some evidence, is remand to the Governor for further consideration of the record. We have addressed this issue in *McDonald, supra,* and conclude, as we did there, that *Prather*, which addressed a reversal of the Board's denial of parole, not a Governor's denial, does not mandate remand to the Governor: The limitation that had been imposed on the Board's review in Prather, and in earlier cases, infringed the authority of the Executive Branch to make the necessary parole determinations; the Court held this was a violation of the separation of powers established by the Constitution (Cal. Const., art. III, § 3). (*Prather, supra*, 50 Cal.4th at p. 253.) Here, in contrast, we reinstate an earlier Executive Branch decision -- made by the Board -- overturning only the "veto" of that decision by the Governor. (See *id*. at p. 251.) The power of the Executive Branch is, in this instance, not infringed, but respected. Unlike the Board, which has the obligation and ability to take evidence, consistent with due process protections, the Governor cannot create an evidentiary record. A return to the Governor for reconsideration would therefore mean that the Governor could look again only at the record before him on initial consideration, the same record this court has reviewed. We have reviewed that record, and neither the Governor, nor the Board, has the authority to "'disregard a judicial determination regarding the sufficiency of the evidence [of current dangerousness] and to simply repeat the same decision on the same record.'" (*Prather, supra*, 50 Cal.4th at p. 258, quoting *In re Masoner* (2009) 172 Cal.App.4th 1098, 1110.)" (*McDonald, supra*, at p. 1024.)

Accordingly, we affirm the grant of the writ.

DISPOSITION

The trial court's grant of the petition for writ of habeas corpus is affirmed and the Governor's reversal of the Board's grant of parole is vacated. The Board's release order is reinstated and Mosley is to remain released from custody on parole on the terms and conditions prescribed by the Board.

ZELON, J.

We concur:

PERLUSS, P. J.

WOODS, J.